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No. 80-1146

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RONALD M. ZOBEL and PATRICIA L. ZOBEL,
Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue,
and STATE OF ALASKA,
Appellees.

On Appeal from the Supreme Court of the State of Alaska

BRIEF OF APPELLEES

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On Appeal from the Supreme Court of the State of Alaska

BRIEF OF APPELLEES

STATEMENT OF THE CASE

Appellees agree in substance with appellants' review of the procedural history of this case set out in their Statement of the Case.

SUMMARY OF ARGUMENT

A portion of Alaska's oil wealth is placed each year in a constitutionally created fund whose principal is not subject to legislative appropriation. Fifty percent of the earnings of the fund are returned to Alaskans each year in the form of dividends. Each resident annually receives one

dividend for each year of residency in the State. As residency increases, annual dividends for each resident increase cumulatively. The dividend program gives each resident a personal interest in prudent management policies for the Permanent Fund and cautious development of the State's mineral resources (which provide the principal of the fund), since only if the fund is adequately preserved will revenues for his future increased dividends be available. Additionally, the cumulative feature of the dividend distribution plan provides an incentive for all residents to become long term members of the Alaska community—an important goal in a State that has been plagued with a high rate of population turnover and its attendant social and economic problems.

This case is fundamentally different from those cases previously before this Court which have dealt with prohibitions directed solely at new residents of a state and which are generally held to be burdens on the fundamental right to travel. This plan treats all residents of the State, new or longer term, exactly the same insofar as their legal rights of participation in the plan are concerned. The plan does not burden the right to travel to Alaska and make a home in the State. It is, in fact, structured so as to encourage the exercise of that right. The issue, then, is not whether the distribution plan is necessary to accomplish compelling state interests, but whether the method of distribution is rationally related to the purposes of the program.

The clearly legitimate purposes of the distribution plan—the encouragement of wise resource development and conservative management of the Permanent Fund, equitable distribution of Permanent Fund income, and the promotion of a stable, long term population for the state—bear a substantial and rational relationship to the cumulative method chosen to distribute dividends to residents each year.

ARGUMENT

I

INTRODUCTION

This case brings before the Court a novel plan under which the State of Alaska distributes wealth excess to present government needs directly to the residents of the State. Every resident without any waiting period or any qualification of need is entitled to receive each year one dividend for every year of residence within the State. Years of residency may be accrued from 1959, the date Alaska became a State and came into possession of the resources from which the wealth is derived.

A plan by which government literally issues dividends to residents of a state is unique in American political tradition. It is, however, a plan specifically tuned to the unusual economic and political problems existent in Alaska today, and before the legal issues concerning the plan can be viewed in perspective, it is first necessary to understand the particular circumstances that led to its creation.

In 1967, a major oil field was discovered on State owned lands in Prudhoe Bay. After literally centuries of nonexistent government services and widespread poverty, the find at Prudhoe Bay appeared to represent economic salvation for the State.[1] The promise became reality when, in 1969, the State leased additional acreage at Prudhoe Bay. Cash bonus bids received at the lease sale equaled roughly $900 million, a massive infusion of revenue to a State of approximately 300,000 people whose total annual budget

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[1]For a general review of the economic situation in Alaska prior to and shortly after Statehood, *see*, C. M. Naske, An Interpretative History Of Alaskan Statehood (1973); E. Gruening, The State Of Alaska (1968).

in 1969 was $124,000,000.[2] The future appeared bright, since most residents assumed that more massive oil finds were imminent and that the revenues from Prudhoe Bay and other finds would produce great wealth for the State.

By 1975, the situation had drastically changed. The Trans-Alaska pipeline necessary for production of Prudhoe Bay oil had been held up by litigation and no significant royalties or taxes were flowing to the State. There had been no significant new oil finds. The $900 million was gone as a result of vastly increased public spending[3] that left little of lasting consequence, and the State was facing a massive budget deficit. Revenue from Prudhoe Bay oil would shortly be forthcoming, but the residents of Alaska looked to the future with a slightly more realistic understanding of what "oil wealth" meant to them.

The primary lesson derived from this experience was that oil wealth, unlike revenues of the State derived from renewable resources, was finite in nature. The $900 million for instance, had been a one time bonus—its loss was irreplaceable. Eventually, all of the wealth derived from oil would be gone and with it, any attendant resource development industries. The State faced a problem basically unknown to other states or, for that matter, most nations—a resource dominating the economy that would create huge amounts of wealth for a limited period of time and no amounts of wealth thereafter.

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[2]Chapter 236, 1968 Session Laws of Alaska (SLA).

[3]The total budget for all state government functions in Alaska had increased from approximately $70,000,000 in FY 1960 to $124,000,000 (Ch. 236 SLA 1968) in FY 1969. In FY 1970, the budget increased to $154,000,000 (Ch. 114 SLA 1969). The FY 1971 budget, the first following the oil sale, jumped to $314,000,000 (Ch. 250, SLA 1971) and by FY 1975, the annual expenditures had reached $462 million (Ch. 147, SLA 1975).

One option available to the State was simply to enjoy the bonanza while it lasted and leave the problems to future generations. To the credit of its people and its political leaders, the State rejected that option, at least in part. While oil wealth has benefitted present day Alaskans well, the residents of the State have initiated a program by which at least a portion of the oil wealth will be saved for future generations—a program by which some of the finite oil revenues can be translated into sustained economic benefits. The program is called the Permanent Fund.

In 1976, the citizens of the State of Alaska adopted a constitutional amendment establishing a fund comprised of a percentage of the rentals, royalties and lease sale proceeds received from oil and gas development in the State. The principal of this fund may not be appropriated by the legislature for any purpose; only the earnings from investment of the principal may be utilized for government programs.[4]

The Permanent Fund was created for two basic reasons. First was a recognition of the fact that the oil wealth available to Alaska today is limited in duration—that unlike funds generated by development of renewable resources such as timber or fish, revenues from oil development will end at some fixed time. Government programs established from today's oil wealth will require future funding from other sources, which may or may not be available. Accordingly, steps had to be taken to insure that ongoing government programs did not become dependent on limited oil wealth. By placing a portion of the oil revenues in a constitutionally protected fund, and by permitting only the sustained earnings from the fund to be

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[4]The full text of the Permanent Fund Constitutional provision is set out in Appendix A to Appellants' brief.

appropriated for government services. Alaskans insured that these services could continue for themselves and future residents far past the time when the oil itself was gone.

The second reason for the creation of the fund stemmed from Alaskans' dissatisfaction with the manner in which the $900 million had been dissipated. Through the mechanism of a constitutional amendment, Alaskans sought to insure that some of the future oil money would not be spent on costly government projects which might be politically appealing but in the end would prove both unnecessary and wasteful. By placing at least a portion of oil revenues in the fund, the State insured that the waste would at least be minimized.

Even the earnings from the Permanent Fund were substantial, however, which led to similar concerns over the possible waste of money and the unwarranted growth of government. Government growth is a concern everywhere, but in Alaska the problem has a peculiar twist. In most states, increases in government expenditures are irrevocably tied to an increase in individual taxes—a political debit to counterbalance the benefits bestowed by any new program. In Alaska, however, since public revenues can be raised from the sale and development of oil leases, personal taxes need not be imposed, and there is no counterbalancing debit. New government programs can be established without ever affording the electorate a clear political choice. Increased government, however, has social and political implications that should require political choices. A major Alaskan issue then was how to create those choices—how to bring home to the people the fact that it was money from development of their resources that was used to increase the size of government.

The solution was unique in its simplicity. Instead of leaving the way open for all of the earnings from Permament Fund principal to be used for funding new government programs, a portion of the earnings would be distributed directly to the people in the form of dividends. If subsequent legislatures chose to create new programs, they would be required to fund those programs by using earnings from the fund which otherwise would be distributed to the people or by using revenues that could be deposited instead in the Permanent Fund to produce additional earnings for dividend distribution. It was a system set up to duplicate the choices the legislature must make when it raises individual taxes to fund new government programs—a method of creating a constituency with an interest in overseeing the growth of government because with that growth would come a corresponding decrease in dividends received.

Annual permanent fund dividends are presently small,[8] but they are an important symbol of the relationship between the people of Alaska, the resources that the State holds in trust for them, and the Permanent Fund in which a part of the revenues those resources is contained. Management of the principal of the fund now has a direct bearing not only on the general economy of Alaska but on the annual amount of dividends each Alaskan will receive. Moreover, since the fund is created from resource development, each and every Alaskan has an interest in overseeing

[8]The annual dividend for each year of residency is now fifty dollars. Since annual payments are made to the principal of the Permanent Fund, it is anticipated that both the principal and the earnings of the fund will increase in the future, and the value of each dividend will increase in the future. Permanent Fund dividend distribution for 1981 is estimated to total $130,000,000, which state revenues for FY 81 are estimated to be in excess of 3.6 billion dollars. Revenue Sources, FY 1980-82, Alaska Department of Revenue (January, 1981).

that development—a critical and desirable goal in Alaska where the future is entirely dependent on wise choices in resource utilization. The dividend plan is not simply a modern version of share-the-wealth—it is, instead, an experiment in controlling government growth through involving a state's population directly and personally in the management of resources that belong to them.

II

THE PERMANENT FUND DIVIDEND PROGRAM DISTRIBUTES EARNINGS FROM THE PERMANENT FUND IN A MANNER UNIQUELY CALCULATED TO ACHIEVE IMPORTANT STATE OBJECTIVES

The establishment of the Permanent Fund and the conservative plan subsequently adopted for management of the principal of the fund[6] evidenced a basic commitment by Alaskans to forego at least some immediate short term benefits from oil wealth in favor of achieving long term goals. The specific method chosen by the legislature

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[6]The decision as to how the principal of the Permanent Fund was to be managed was made after three years of difficult and vigorous legislative debate. The legislature eventually rejected proposals which would have authorized the principal to be used for parochial but risky local investments to benefit present Alaskan residents in favor of a highly conservative investment plan. The Free Conference Committee which authored the final measure justified its choice in these terms:

> "In making their decision on the Alaska Permanent Fund, The Free Conference Committee has focused on a single question—the management of the Fund's principal.
>
> • • •
>
> The Fund is designed to be a trust which focuses on the safety of principal first and the maximization of earnings second. It is a trust held to a more restricted list of investments than most other fiduciary trusts including the Alaska State Pension Funds . . ."

1980 *Joint House and Senate Journal Supplement No.* 7 (April 2, 1980).

to distribute dividends from the earnings of the fund evidences the same commitment. Under this distribution method, all residents are entitled to receive annually one dividend for each year they have resided in the State. The cumulative feature of the plan means that while all residents have exactly equal rights to derive benefits from the plan over time, individual residents will receive varying amounts from year to year, dependent on how long they have participated in the program through their maintenance of State residency. In any one year, for instance, a three year resident would be entitled to three dividends while a ten year resident would receive ten dividends. The following year, the then four year resident would receive four dividends, while the then eleven year resident would receive eleven. Each subsequent year would bring increased cumulative dividend distributions to these and all other residents.

The key feature of this method of distribution is that no matter when an individual begins his participation in the plan, through birth or migration, the total number of dividends received in the future will always be greater than the number of dividends received today. The system gives every single resident a personal interest in insuring that as his cumulative dividends increase, the Permanent Fund remains a steady and regular source of earnings from which those dividends may be paid. That in turn will occur only if the resources on which the future of the fund depends are developed wisely, and the funds from the development carefully managed. In essence, the cumulative feature of the plan insures that the personal financial interests of all residents, present and future, will coincide with the overall public interest in maintaining a Permanent Fund not only capable of funding necessary government services when oil is gone but also capable of providing a source for dividend payments far into the future.

The manner in which the cumulative method of distribution serves to encourage interest in prudent management of the Permanent Fund is perhaps best demonstrated by contrasting this method with the method which, in appellants' view, would be most desirable—an annual per capita distribution of equal amounts to each resident. Instead of instilling in residents an interest in assuring that there will be a healthy income stream from the fund in future years, a per capita distribution is more likely to have precisely the opposite effect. Under a system of per capita distribution, as the population of the State increases, individual shares in the total amount to be distributed are necessarily diluted, and individual annual dividends will decrease. On the other hand, if Permanent Fund earnings were rapidly accelerated in the early years of a per capita distribution program before the population grew substantially, then residents during those early years would receive greater annual payments than they would be likely to receive in future years when population growth would be a substantial factor in determining the per capita share. The impact of inevitable population growth on a per capita distribution would create obvious pressures on the legislature to provide for an immediate and rapid acceleration in the growth rate of Permanent Fund earnings so as to maximize dividends for present day residents.

There are only two ways in which the rate of growth in Permanent Fund earnings can be accelerated on a short term basis. The first is by increasing the percentage return on investments of fund principal. But a significantly higher rate of return would require investments that carry a correspondingly higher risk of capital losses, and this kind of investment policy would totally frustrate the long term goals sought to be achieved through the Permanent Fund. The second way that earnings from the fund can be quickly increased is by quickly increasing the amount of principal

that is available for investment. That, in turn, could only be accomplished by increasing the percentage contributions of mineral resource revenues flowing into the fund or through maximum and immediate development of the resources themselves. Increasing contributions to the Fund would be desirable, but eventually contributions would reach one hundred percent. At that point, there would be inevitable demands for immediate lease sales and for early extraction of minerals, even if prudent resource management dictated that more revenues ultimately would be obtained if lease sales and mineral extraction were postponed far into the future. This might serve the interests of present day Alaskans well, but it would do a disservice to future generations of State residents.[7]

The real problem faced by the legislature in selecting a method of dividend distribution was to insure that the same personal interest motivation which is at the heart of the dividend plan did not act to destroy it by creating present pressures for distribution contrary to the long term goals of the Permanent Fund itself. The cumulative method of dividend distribution avoids those present pressures, substituting in its place a system by which every single resident has a long term interest in prudent management of the Permanent Fund and the resources on which it depends.

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[7]This is a particularly serious problem when distributing wealth from finite non-renewable resources like oil. If all of the present benefits from a renewable resource like timber or fish were to be distributed today, there would be little danger that future residents would be deprived of similar benefits. But the benefits from oil are available only so long as the oil remains. As trustee of the State's natural resources, today's government has an obligation to insure that tomorrow's residents will benefit at least in part from this finite resource.

The cumulative system also furthers a separate and distinct purpose of the distribution plan. Any dividend distribution plan might well provide an incentive for new migrants to come to Alaska. But the cumulative system provides not only an incentive to migrate but an additional incentive for both new and longer term residents to stay, since the future promises larger and larger cumulative distributions. In a small state which still possesses a very real sense of community, a cumulative system of dividend distribution has the effect of encouraging both new migrants and persons born in Alaska to continue their residence so as to become long term members of the community.

Alaska's inability to maintain a stable, long-term population in the face of its historically high cost of living, harsh climate, geographic isolation and dependence on a seasonal economy has created social and economic problems that have plagued the State through years of boom and bust. The incentives provided by the cumulative method of dividend distribution may not be enough to cause every resident with reasons to move from Alaska to maintain residence in the State. But it will certainly be a factor that every resident will consider in making that decision.[8]

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[8]"Throughout its history, from the days of the Gold Rush to the recent oil pipeline period Alaska has been prone to the phenomenon that large numbers of people from without the state move in, derive great financial and other benefits from the state resources and opportunities; and then move out to enjoy the fruits of their labors elsewhere. This obviously results in a great drain of financial and other resources from the state.

* * *

Since this problem is a necessary by-product of the free exercise of the right of interstate migration, neither Alaska nor any other state may attempt to ameliorate it by penalizing an individual for choosing to exercise the right to migrate. However, this does not preclude an attempt to reward those Alaskan residents who have

The appellants have focused their argument in this case on the fact that while rights to participate in the distribution plan are the same for all residents, in any one year individual residents will receive differing amounts of cumulative dividends. They assert that this differential means that the plan is in the nature of a durational residency requirement, one that is inconsistent with the right of interstate migration, rights of state citizenship, and the equal protection of the law. We shall discuss these points in detail, but before proceeding to that discussion, we should like to comment at least briefly on appellants' general view of the dividend plan and the purposes which lie behind it.

In rather graphic terms, appellants have dismissed the stated purposes of this act[9] in favor of a broad attack on the legislature, the executive branch and the judicial system in Alaska. The legislature is accused of having the overriding purpose of establishing "financial policies that would insulate long time Alaskans from sharing the fruits of Alaska's development." Appellants' Br. at 8. The Attorney General of the State is accused of "concocting" a purpose for the Act as an "afterthought." Appellants' Br.

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chosen to stay, to enjoy the fruits of their labor here, and to make a lasting contribution tangible or intangible, to the state's culture and commonwealth." Williams v. Zobel, 619 P.2d 448, 459-60 (Alaska 1980).

[9]Sec. 1(b) Ch. 21, SLA 1980 specifies the purposes of the dividend distribution plan to be:

> (1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;
>
> (2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and
>
> (3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art. IX, sec. 15, state constitution).

at 47. The Alaska Supreme Court is charged with having demonstrated "irrational prejudice toward new residents" in its analysis of the case. Appellants' Br. at 36 n.23. These allegations are both intemperate and erroneous. They are based on a haphazard and misleading representation of legislative debate on the issue, and a basic misunderstanding of the operation of the distribution system itself.

The comments of individual legislators quoted in appellants' brief are highly misleading. For instance, appellants mention that there was a tax bill pending before the legislature at the same time as the Permanent Fund bill but do not point out that most of the comments quoted are aimed at *that* bill.[10] Nor do appellants note that other

[10]The tax measure provided that all persons (resident or nonresident) who filed income tax returns for three years were thereafter exempt from tax liability. It was prompted, in large measure, by legislative concern that transients such as those who had come to Alaska during the construction of the Trans-Alaska pipeline pay their fair share for state services. The measure was held invalid by the Alaska Supreme Court, which held that though the measure on its face was not directed at new residents, the impact of the remaining tax liability would fall disproportionately upon recent migrants and penalize the exercise of their right to travel which the court concluded was an important right under the *State* Constitution. Williams v. Zobel, 619 P.2d 411 (Alaska 1980). This is, of course, the same court which in appellants' view has an "irrational prejudice toward new residents." The same "irrational prejudice" has been demonstrated in a series of past Alaska cases that have taken the concept of the right to travel substantially *beyond* the limits articulated by this Court. *E.g.*, State v. Adams, 522 P.2d 1125 (Alaska 1974) (one year residency period for divorce *invalid* under State constitution as penalty on right to travel); *and see*, Rabinowitz, J., concurring in Thomas v. Bailey, 595 P.2d 1 (Alaska 1979):

> The uniquely important status of right-to-travel protection of the Alaska Constitution reflects, in part, an awareness of the distinctive character of this state in attracting many new residents to participate in Alaska's growth and expansion. *Id.* at 16

Chief Justice Rabinowitz is the author of the opinion below in this case.

comments by individual legislators specifically rejected the very prejudice claimed to exist in the body as a whole.[11] But most important, appellants fail to note that individual legislator comments on either side of an issue have been specifically rejected in Alaska as a source of legislative intent, just as they have been by this Court as a source of Congressional intent.[12]

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[11]For instance, in response to the lengthy comments of Representative Randolph quoted at pp. 7-8 of appellants' brief, Representative Cotten replied:

> Of course, I'm not a constitutional lawyer either, but I feel like both these bills do address the problem that he has pointed out, in that everyone is treated alike. The taxpayers that have been here and have made their—have filed their returns over the past years, they needn't be residents, so we really aren't discriminating against residents—residents versus nonresidents. Nor are we discriminating against newcomers. In fact, I don't think anyone here really is opposed to seeing newcomers. I think that the complaints you hear more often than about newcomers are about the people that come and stay for a season and leave, and don't ever have any intention of staying. And those people that do want to come and make Alaska their home can—can build their longevity and build their ability to collect under these programs. . . . (R. 212.)

Representative Brown, whose comments are cited in appellants' brief also stated in remarks which are not so included:

> We are not doing something that restricts interstate travel of individuals. That is usually the kind of thing that—argument that is made for striking down things based upon residency. We are not doing anything that restricts the ability for someone to get a job, to get gainful employment or to vote, simply because he wishes to exercise his constitutional right to travel among the various states. (R. 223.)

[12]Starr v. Haagland, 374 P.2d 316 (Alaska 1962). (Comments of individual convention delegates irrelevant in interpreting consti-

The basic fallacy in the way appellants view this plan lies in their assertion that it establishes two classes of people—long term residents who receive all the benefits of Alaska's development and "newcomers" who are denied the "fruits" of that development. This view permeates appellants' brief, and removes many of their arguments a good way from the real issues. For instance, in discussing citizen involvement in the management of the Permanent Fund and Alaska's resources, appellants state that Alaska has never shown why "one group" of residents should be given an "incentive to be more interested in the fund than other residents." Appellant's Br. at 43. And in discussing incentives to stay in the State, appellants question why the State should be allowed to create "greater incentives for longer term residents to remain in the state." Appellants' Br. at 41. In both cases, appellants miss the basic point—that the *amount* of money received at any one time is not the critical feature of the distribution method. What is critical is that no matter *how* long you have resided in the State, no matter how much one receives at any one time, *all* residents will receive more the longer they stay. It is the cumulative feature, not the annual amount that makes this plan work. If, in fact there were two classes of residents established by this plan, appellants' arguments might have some substance. But there is no defined class of "newcomers" or "old-timers." Each resident has the same right as any other to an annual dividend, each has the same right to accumulate dividends, and any differences in annual amounts received apply uniformly to short term, middle term, or long term residents. This is not a plan that insulates and rewards only

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tutional provision); Arizona v. California, 283 U.S. 423, 455 (1931) (the motives of Congress are not a proper subject of judicial inquiry); United States v. O'Brien, 391 U.S. 367, 383 (1968) (court should not attribute an impermissible purpose to Congress if the result would be to strike down an otherwise valid statute).

"old-timers." It is a plan that benefits all Alaskans, present and future, by preserving and enhancing their resource wealth and by assisting in the development of stable, long term population growth in the state.[13]

III

THE DIVIDEND DISTRIBUTION PLAN DOES NOT PENALIZE THE RIGHT OF INTERSTATE MIGRATION

The right to interstate migration is fundamental to the unity of this nation and cannot be infringed directly or indirectly by any state. *U.S. v. Guest*, 383 U.S. 745 (1966); *Edwards v. California*, 314 U.S. 160 (1941). But it was not until *Shapiro v. Thompson*, 394 U.S. 618 (1969), that this court directly confronted the legal impact of durational residency laws on that fundamental right. In *Shapiro*, the issue was the validity of a series of statutes that barred new migrants to a state from welfare benefits until they had resided there for one year. The court viewed the requirements as creating ". . . two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year

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[13]Much of appellants' arguments concerning a preference for "old timers" seems to be premised on the fact that the program permits residents to count their years of residence as far back as 1959, the date of statehood. But as the Alaska Supreme Court noted in its opinion below, the selection of 1959 as the year from which dividends could be counted "is not a significant aspect of this statute" in terms of its constitutionality. If, for instance, instead of beginning the program "in medias res," the legislature had provided for dividend accumulation beginning in 1980, a person arriving in the state in 2001 would be in precisely the same position as appellants. As the Alaska Court found, "if the statute were constitutional with residency counted from 1980 as to residents migrating into Alaska in 2001, it is constitutional as to the Zobels here with residency counted from 1959." Williams v. Zobel, 619 P.2d 448, 461 n.37 (Alaska 1980).

or more and the second of residents who have resided less than a year in the jurisdiction." *Shapiro v. Thompson, supra* at 627. Solely on the basis of that distinction, the first class was granted, and the second denied, welfare benefits ". . . upon which may depend the ability of the families to obtain the very means to subsist—food, shelter and other necessities of life." *Id.* at 627. The Court held that a classification of this nature penalized recent migrants to a state and could only be justified by a compelling state interest which in turn the court found lacking.

Shapiro was followed by *Dunn v. Blumstein,* 405 U.S. 330 (1972), where the court held unconstitutional a Tennessee requirement that in order to vote, a person had to be a resident in the State for one year and in the county for three months. The court again focused on the isolation of recent migrants into a penalized class, commenting:

> Durational residency laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right. In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote. Absent a compelling state interest, a state may not burden the right to travel in this way.

Dunn v. Blumstein, supra at 342. The principles established in *Shapiro* and *Dunn* have remained undiminished, but they have been clarified somewhat by recent decisions. In *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974), the court struck down as a "penalty" on interstate migration a prior residency requirement of one year for receipt of nonemergency health care. In the Court's words:

> In *Shapiro,* the Court found denial of the basic necessities of life to be a penalty. . . . Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at

> least clear that medical care is as much a basic necessity of life to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic subsistence have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.

Memorial Hospital v. Maricopa County, supra, at 259. The court concluded that:

> . . . the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.

Id. at 261.

There have been two instances in which this Court has specifically upheld durational residency requirements. Commencing with a memorandum affirmance of a District Court opinion in *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971), the Court went on to note in *Vlandis v. Kline,* 412 U.S. 441, 452 (1973), that it was permissible for states to require new residents to pay higher tuition at a state university than that paid by longer term residents. And in *Sosna v. Iowa,* 419 U.S. 393 (1975), the Court held that a statute which denied recent migrants to a state access to the courts for divorce did not infringe on the right to travel. In *Sosna,* the Court found a rational basis for the waiting period apart from simple "budgetary or record keeping considerations" which in its view had been the primary justification used by states in prior right to travel cases. Moreover, unlike previous cases where the need for medical or welfare services had been immediate, the Court in *Sosna* found that the plaintiff would not be foreclosed from achieving what she desired, albeit at a later time, providing she com-

lied with what the Court found to be a reasonable waiting period.

This case is fundamentally different from the right to travel cases that have previously come before this Court.[14] Those previous cases share a basic ingredient—the separation of residents of a state into two distinct classes, new migrants and everyone else. In *Shapiro,* for instance, the Court spoke of "two classes of needy resident families undistinguished from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year in the jurisdiction." *Id.* at 627. In *Dunn*, the Court noted that the onus of durational residency laws is that they burden the right to travel "by imposing their prohibitions on *only* those persons who have recently exercised that right." *Id.* at 342 (emphasis supplied). The distinctions made in the Permanent Fund plan, however, are *not* focused at newly arrived residents—they apply equally to all residents of the State. The rights of all residents to an equal annual dividend and the right to accumulate dividends have nothing to do with whether they are recent migrants or not. All residents, those who migrated at any time and those born in the State,[15] are treated exactly the same. And to the

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[14]Appellants appear to concede these differences in their brief. For instance, on p. 4 of their brief they note that the dividend plan is not merely quantitatively different than durational residency requirements but "qualitatively" different as well. And while on p. 16 of their brief, appellants note that this Court has characterized durational-residency requirements as "waiting periods," they then go on to note at p. 17 that the dividend distribution plan does *not* impose a "waiting period" in the *Shapiro* or *Sosna* sense at all.

[15]The fact that the dividend plan applies with equal impact to persons who were born in Alaska obviously makes it somewhat difficult to characterize the law as one that discriminates against "recent migrants."

extent that the rights of accumulation result in different amounts of money being received by residents in any one year, again it has nothing whatsoever to do with recent migration. A resident who has been in Alaska ten years receives different cumulative dividends than a resident who has been here for twelve years. A six-year resident receives different amounts at any one time than a seven-year resident. These differences must be rationally justified, but it is critical to recognize that newly arrived residents are treated no differently than long term residents in dividend allocations. The legal issue here is not the right to travel. It is simply whether the legislature may establish a dividend distribution program by which all residents of Alaska increase the number of annual dividends they receive as they increase their residence in the state.[16]

Perhaps the most graphic illustration of the uniform application of the dividend distribution method can be shown by appellants' own efforts to characterize themselves as a part of a "suspect class" of "newcomers" to the State. Appellants' Br. at 19-22. In appellants' view, the unarticulated basis of this Court's decisions on right to travel may, in fact, be the existence of such a suspect class and an effort by the Court to protect those new migrants from "class legislation." *See,* McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or Newcomers as a Suspect Class?*, 28 Vand. L. Rev. 987 (1975).

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[16]An example may tend to clarify the significance of this point. If a law required that all blacks retire from a police force at age 50 there would clearly be a "suspect class" created, and the focus of the Court would be on the basis for that classification rather than the age requirement itself. We have no doubt that such a law would be invalid. But if the law were extended so that *all* persons, regardless of race were required to retire from the police force at 50, the inquiry shifts from the classification to the rationality of the age requirement itself, and the result is different. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

But the basic flaw in this argument (aside from its assumed but unproven premise) is apparent the moment one attempts to describe the "class" in this case. A suspect class is one "saddled with disabilities," one subjected to a history of "purposeful unequal treatment" and one with such "political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School District v. Rodrigues*, 411 U.S. 1, 28 (1973); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Since the differences in cumulative dividends received under the distribution plan at issue here apply to all residents, and apply uniformly regardless of length of residency, it is difficult to understand what specific "group" is "saddled with disabilities." Is a fifteen year resident of Alaska a part of this class because he receives fewer annual dividends than a twenty year resident? Are appellants (now three year residents) a part of the class because they receive five fewer annual dividends than an eight year resident? Is a one year resident a part of the class because he receives two fewer annual dividends than the appellants? Since appellants will always receive more dividends than some and less than others, are they the beneficiaries or the victims of the "majoritarian political process" they claim to fear?[17]

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[17]Indeed, it is difficult to determine who the "majority" really is in this analysis. While appellants suggest (through reference to a legislator's comments during debate) that a majority of legislators would receive the maximum amount of dividends under the act, they fail to note that just slightly less than 50% of the legislators would *not* receive the maximum benefit. See *State of Alaska Election Pamphlets*, 1978, 1980 for duration of residence of legislators voting on the bill. Yet, the dividend plan passed the House 35-3 and the Senate 18-0, hardly a rampant display of self aggrandizement. *See*, Alaska House Journal, 2d Session, 11th State Legislature, 965, 966 (1980); Alaska Senate Journal, 2d Session, 11th State Legislature, 754 (1980). Moreover, as shown in Appendix A, applications received by the Department of Revenue

To the extent "class" legislation analysis has any application here, this case is like *Rodrigues* and *Murgia*. In both those cases, allegations were made that because members of what could be a suspect class fell within broader statutory classifications, the broader classifications were in themselves suspect. But the Court rejected those contentions, noting in *Murgia* that while the "elderly" obviously were contained in a requirement for mandatory retirement at age 50, the line had actually been drawn in middle life and had not been aimed at the elderly. In *Rodrigues*, the Court held the fact that certain school districts contained a substantial number of poor people was irrelevant in determining whether the school foundation program attempted to establish classifications based on poverty.

The Permanent Fund dividend program means that "newcomers" will always receive less money than people who have been residents of Alaska longer than they. But that is because *every* resident of Alaska receives fewer total cumulative dividends in any one year than people who

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for Permanent Fund dividends indicate that over 70% of the applicants are *not* entitled to the maximum benefits, a fact that is hardly surprising in a State whose population has doubled in 20 years. Perhaps of particular interest are two facts: that nearly one third of all applicants have lived in Alaska for less than 5 years; and that only 28% of all applicants are "old timers"; *i.e.*, those who have lived in the State 21 years or more. The "majority" that supported this program consists of Alaskan residents and their legislators of all durations of residency.

Since this case was resolved by summary judgment, there is no factual record concerning who would qualify for Permanent Fund dividends; nor for that matter was evidence available on the point at the time of suit. Since that time, dividend applications were received and have been analyzed by computer. We are making this computer printout available to the Court solely in an effort to demonstrate that the sweeping factual assertions made by appellants, which are totally unsupported by anything in the record, are in addition, totally incorrect.

have been residents longer than they. There is no class, suspect or otherwise, established. The law is uniform.

The appellants seem to confuse their rights to participate in this program with the amount of money they receive at any one time under the program. If, for instance, appellants were recent migrants to Alaska seeking welfare, they would receive under Alaska law the immediate right to participate in the welfare program. But they would not have a right to the maximum amount of money received by *anyone* under the program. If Alaska awarded welfare benefits on the basis of the number of dependent children, and appellants had but one, they would not be able to claim the maximum benefit received by people with a greater number of children—only the right to receive benefits under the same standards applicable to all Alaska residents. Here, the qualification for participation in the dividend program is not need, but the simple status of residency. Alaskans have determined, for specific reasons, to allcoate dividends among residents by a particular formula of annual distribution. Appellants have every right to demand that the formula applicable to all Alaskans also apply to them, without distinction. That is exactly what they have received.

The second major distinction between the dividend distribution system and previous durational residency cases lies in the fact that the dividends distributed have no relation to any individual need of the recipient. In the terminology of past cases in this court, there is no "fundamental necessity of life" involved here however broadly that term may be interpreted. While appellants understandably denigrate the past terminology, it clearly has been at the heart of the Court's decisions. The first holding in *Shapiro* defined a "penalty" on migration to be a denial of "basic, necessities of life." *Maricopa County* reiterated that concept of "penalty" and went on to note that "medical care

is as much a basic necessity of life to an indigent as welfare assistance." *Id.* at 259. The Court went on to comment that "privileges or benefits necessary to basic subsistence are of greater constitutional significance than less essential forms of government entitlements." *Id.* The Court then applied a "compelling" state interest test because in its view, the right to travel guaranteed new residents equal rights to "vital government benefits and privileges" as those held by all other residents of states to which they migrate.

This emphasis on the importance of the benefit seems to be directly tied to the Court's concern with the impact on the constitutional right at issue—the right to migrate from state to state. It is one thing to say that if a law denies to new residents some government benefit necessary to basic sustenance no actual deterrence of migration need be shown to trigger "strict scrutiny." It is another to say that even minimal distinctions between new and old residents of a state raise a federal constitutional issue. The judicial concern has been to insure that rights of migration necessary to accomplish national union be free of state interference. That in turn has resulted in an emphasis on important human needs—the so called "basic necessities of life."

Appellants seek to avoid the present lack of relationship between dividends and personal need by raising a spectre of future action by the State by which all social programs based on need would be abolished and replaced by increased dividends based on residency. The accuracy of this prediction can perhaps be measured by the fact that social programs based on need have substantially increased in Alaska since the Permanent Fund plan was adopted.[18]

[18]See Appendix B where budgetary appropriations for social welfare programs before and after the creation of the dividend plan are compared.

There is no reason to assume that the legislature will suddenly reverse its historically generous attitude toward the destitute in the future. Moreover, a graduated welfare distribution plan tied to residency would not only be obviously unconstitutional—it would be incredibly inefficient and totally inadequate to address the interests of the needy. Under what conceivable theory would the legislature want to give large amounts of money to only slightly needy people who had lived in Alaska perhaps twenty years while denying necessary amounts to other people with much greater need who had not been in the state for that period?

What is perhaps remotely conceivable, though highly unlikely, is that if the population of Alaska did not increase substantially and enormous new finds of oil created greater and greater dividends, the legislature might decide someday that even the lowest surplus dividend payments were more than sufficient to provide the maximum amounts necessary for any form of public assistance, and that therefore, no such assistance programs were necessary in the future.[19] In that case, since all residents of any duration would receive an amount equal to what they would receive under any public assistance program plus in many cases, additional payments, we fail to see how this unlikely occurrence would violate the Constitution.

The final distinction between this and previous durational residency cases lies in the overall impact of the plan. The permanent fund dividend plan distributes sur-

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[19]The improbability of this occurrence is emphasized by the fact that the Free Conference Committee which wrote the final version of this bill specifically clarified the fact that dividends received would *not* be considered income for the purpose of determining whether individuals qualified for welfare assistance based on maximum income levels. (R. 217.)

plus oil revenues to residents using a distribution method that is designed to achieve long range goals—to insure that benefits accrue not only to present-day residents of Alaska, but to residents who have not yet come to the State. Each new resident receives exactly the same rights of accumulation as those who have come before. If he remains a resident for the same amount of time as another resident, he will receive the same amount of accumulated dividends. If a new resident does not reside in Alaska as long as another, he will receive less in the aggregate. But that will be the case whatever system of distribution is utilized. Even under the per capita system urged by appellants, a ten year resident over the period of his residency will receive half as much as a twenty year resident and ten times as much as a one year resident. This disparity results from the fact that participation in the program arises simply from being a resident, which in turn gives rise to an interest in the resources. Under the cumulative system adopted by the Legislature, the difference between the amount a new resident will receive initially and the total amount already received by a resident who arrived earlier is greater than it would be under a per capita system. But if the new resident lives in Alaska for the same total number of years as one who arrived earlier, the new resident makes up the initial difference in exactly the same period of time as he would under a per capita system, because he accumulates dividends at a higher rate. Under the cumulative system, equality is achieved in the aggregate, just as it would be under a per capita system.

The concept of equality in the aggregate would, of course, be meaningless if applied to the type of government programs at issue in *Shapiro* and *Maricopa County*. It makes no sense in the area of medical care to suggest that though someone does not qualify today because he

has not lived in the State long enough, he will qualify for similar medical care at a later time. If someone is sick, he needs care today—what will happen later is irrelevant. The purpose of medical care, welfare or similar programs is to deal with present individual need. For those programs the appropriate basis of comparison to determine whether similarly situated persons are treated equally is obviously the similarity of the needs of both long term and newly arrived residents at the time those needs exist, and not the similarity of aggregate benefits that each may ultimately receive under the program. But the permanent fund dividend plan is of a different nature. It is not based on need, "fundamental" or otherwise.[20] It is, instead, a program based purely on the status of residency—a long-term plan to distribute resource wealth in a manner consistent with certain basic policy objectives—primary among them being a wise and cautious approach to the management and development of Alaska's resources so

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[20]It is certainly true that many residents, particularly Alaska Natives living in outlying communities and maintaining a limited subsistence lifestyle, were counting on using their dividends to enhance their cash incomes during the winter months. See, Affidavit of Thomas K. Williams, at p. 5, Appellees' Opposition to Stay. But any "need" felt by those residents was a result of having planned to receive their dividends and of having structured those dividends into their financial plans. The purpose of the dividend distribution is not aimed at relieving economic hardship or providing economic advantage. Programs for that purpose remain unaffected by dividend payments under State law. Obviously, there is wide variance in the personal economic situations of individual Alaskans, and each resident will use his dividends in accordance with his own particular individual needs and desires, whatever they may be. As appellants suggest, the dividends may be used for "food, shelter, clothing, medical care, or fuel." They may also be used for vacations, a new car, purchase of stock, or anything else.

that this generation of residents will not be the only group to benefit from them. And since this is a distribution program with long term objectives unrelated to present need, it is entirely appropriate to compare its impact on residents over the long term.

The Alaska dividend plan does not involve the denial of any government services to anyone. Unlike medical benefits (*Maricopa County*) welfare (*Shapiro*), the right to vote (*Dunn*), or even the right to obtain a divorce (*Sosna*) all of which were withheld from recent migrants in right to travel cases, nothing at all is "prohibited" here. Prospective migrants need not "choose" as they consider a move to Alaska. *Dunn v. Blumstein, supra*, at 342. The only question is what additional benefits they will *gain*—the precise amount of a unique annual dividend bestowed only upon those who live in Alaska. There is no penalty imposed on those citizens of other states who exercise their right of interstate migration.

IV

THE DIVIDEND PLAN DOES NOT INFRINGE ON ANY FEDERALLY GUARANTEED RIGHT OF STATE OR NATIONAL CITIZENSHIP

The 14th Amendment to the U.S. Constitution contains a clear federal guarantee of the right of any United States citizen to become a citizen of any state in the Union. Appellants assert this federal guarantee is a substantive right here—one which in their view voids the classification utilized in the dividend plan. Totally apart from any alleged "penalty" on the right to travel, appellants argue that the "federal component" of state citizenship bars a state from making any classifications based on when a state citizen in fact became a citizen. As appellants put it, "the State has no legitimate interest in so distinguishing between persons whose right of State citizenship is

anchored in the Fourteenth Amendment." Appellants' Br. at 32.

The primary authorities offered for this conclusion are *Shapiro, Dunn*, and *Maricopa County*, cases which are premised on the right to travel and place no reliance on a federally guaranteed substantive right of State citizenship. And, of course, conspicuously absent from appellants' argument is any mention of cases like *Starns, Vlandis*, and *Sosna* which have specifically approved certain classifications based on length of residency, to say nothing of the dictum in *Shapiro* and *Maricopa County* which indicates that certain distinctions based on when a citizen becomes a resident would be valid—a somewhat inappropriate notion if *all* such requirements violated federally guaranteed rights of state citizenship.

The basic failure in appellants' argument is that they fail to identify the "substantive" rights of citizenship on which they rely. But there are such rights delineated in the Constitution. In Article IV, for instance, it is stated that the "citizens of each state shall be entitled to all privileges and immunities of citizenship of the several states." The 14th Amendment similarly provides that States may not abridge "the privileges and immunities of citizens of the United States." These, in fact are "substantive" rights of State citizenship, which are guaranteed by the Federal Constitution, and they have received regular review by this Court.

Corfield v. Coryell, 6 F. Cas. 546, 552 (E.D. Pa. 1825), laid out the early parameters of "privileges and immunities" in terms that have survived until today. In upholding a New Jersey law restricting access to oyster beds to state residents, Justice Washington, sitting as a Circuit Justice, enunciated the privileges and immunities of citizenships in limited terms. In his view, States were forbidden to

interfere with "the right of any citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take hold and dispose of property, either real or personal." *Id.* at 552.

Blake v. McClung, 172 U.S. 239 (1898), contains one of the clearest statements of the fundamental nature of the privileges and immunities of citizenship. In striking down a Tennessee statute which gave preference to state residents in the distribution of certain corporate assets, the Court went on to note:

> We must not be understood as saying that a citizen of one state is entitled to engaging in another state *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the State . . . [citing examples]. The constitution forbids only such legislation affecting citizens of the respective states as will *substantially* or *practically* put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the people of the United States, by and for whom the government of the Union was ordained and established.

Id. at 256-57 (emphasis supplied).

Only three years ago, in *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978), the Court reiterated the *Coryell* doctrine, summarizing it in these terms:

> In his opinion in *Coryell*, Mr. Justice Washington, although he seemingly relied on notions of "natural rights" when he considered the reach of the Privileges and Immunities Clause, included in his list of situations, in which he believed the States would be obligated to treat each other's residents equally, only those where a nonresident sought to engage in an essential activity or exercise a basic right. He himself used the term "fundamental," 6 F. Cas., at 551, in the modern as well as the "natural right" sense. . . . With respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the State must treat residents and nonresidents without unnecessary distinctions.

Id. at 387.

In *Baldwin*, the Court then went on to pose the question, "Does the distinction made by Montana between residents and non-residents in establishing access to elk hunting threaten a basic right in a way that offends the Privileges and Immunities Clause?" *Id.* at 388. Having answered the question in the negative, the Court upheld the plan, rejecting in addition an equal protection challenge based not on "substantive" rights but on allegedly discriminatory classifications.

The striking aspect of even this brief review of privileges and immunities cases is that the analysis in those cases is so similar to the Court's analysis in right to travel cases. Privileges and immunities—the substantive rights guaranteed to all state and United States citizens are those rights which are "basic and essential" or "fundamental" —rights which if denied would "frustrate the purposes of the formation of the Union." *Baldwin, supra,* at 387. The right of migration, also a right guaranteed to all state and national citizens, is only violated when states penalize

the right by denying "basic necessities of life" (*Shapiro*); strict scrutiny is applied because government benefits "necessary to basic sustenance" are involved (*Maricopa*). The analogy is not coincidental. It represents a considered judgment by this Court manifested by nearly 200 years of consistent interpretation, that those individual rights guaranteed in our national constitution should be restricted to those which are fundamental to the maintenance of the Union itself.[21] Beyond those basic rights which guarantee the unity of the nation, individual states are free to make judgments for themselves as to appropriate public policy. They must of course conform to basic concepts of rationality—laws which make distinctions between persons must not be arbitary. But "strict scrutiny" and prohibitions imposed by federally guaranteed citizenship are limited to the most fundamental types of rights.

Nothing in the Alaska dividend plan infringes upon "fundamental" rights of any kind. There is no threat here to those doctrines of federal constitutional law that bind us together as a nation. There are, of course, distinctions made in the act, and like any distinctions, those between residents must be rationally related to valid legislative

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[21]This general principle extends to other portions of the 14th Amendment. Aside from privileges and immunities and equal protection, both of which are discussed in this brief, the Court has also held that the due process clause of the 14th Amendment is violated only when a state procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). *See also*, Patterson v. New York, 432 U.S. 197, 202 (1977); Speiser v. Randall, 357 U.S. 513, 523 (1958); Leland v. Oregon, 343 U.S. 790, 798 (1952). It will be invoked only where a "compelling" interest or right of a "fundamental character" is at issue; Powell v. Alabama, 287 U.S. 45, 67-68 (1932); and only where "important interests" are at stake. Frank v. Maryland, 359 U.S. 360, 367 (1958).

goals. But since this plan does not penalize or interfere with a separate federal constitutional right, it is neither prohibited outright, nor is it required to be justified by a "compelling" state interest. It is only necessary that the plan be rational.

V

THE PURPOSES OF THE PERMANENT FUND DIVIDEND PLAN ARE VALID, AND THOSE PURPOSES ARE RATIONALLY RELATED TO THE PARTICULAR MEANS CHOSEN TO EFFECT THEM

This Court has consistently held that when an economic measure[22] is challenged *solely* on equal protection grounds, the Constitution requires "only that the classification challenged be rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). *See also, Minnesota v. Clover Leaf Creamery Co.*, 49 U.S.L.W. 411 (U.S. Jan. 21, 1981); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Indeed, in any equal protection challenge where substantial individual interests are not affected, the rational basis standard is appropriate.[23] *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371, 391 (1978); *United States Railroad Retirement Board v. Fritz*, 49 U.S.L.W. 4035 (U.S. Dec. 9, 1980).

We have already described in some detail the circumstances leading up to the enactment of the dividend program and the concerns that prompted selection of the distribution method challenged by appellants. It was certainly reasonable for the legislature to have concluded that resi-

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[22]Management of the assets of the Permanent Fund is obviously a matter of economic concern. But even the mineral resources of the State are ultimately of economic concern, for the oil and gas have no value to the State unless they can be marketed.

[23]The insubstantiality of the individual interests asserted by appellants is discussed in detail below, at 40-41.

dents would be more likely to have a continuing interest in prudent management policies for the Permanent Fund and for mineral resource development in future years if they were provided with a direct personal interest that would itself be promoted by continuing those management policies. This distribution method encourages all residents in a very direct way to be more concerned about those long term management policies than about immediate benefits. It was also reasonable for the legislature to have concluded that residents of Alaska would be reluctant to sever their ties with the State if it meant losing entitlement not just to next year's dividends, but also to the dividends in future years, which by then will have accumulated in ever increasing number. The program clearly provides an incentive for residents to maintain their residency, and it is reasonably calculated to help achieve a more stable population.[24]

It may be that the legislature could have found other ways to accomplish these purposes. Appellants suggest, for example, that the legislature could promote a stable population by improving public services and by creating economic opportunities. Appellants fail to point out, of course, that the legislature is already pursuing these means in addition to the dividend program, but even if it were not, this Court has consistently held that a State is not required

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[24]Appellants totally misunderstand how this feature of the plan would operate in practice. For instance, appellants question why the State would want to provide an incentive to people, who, through their length of residency, have already demonstrated their commitment to the State. (Appellants' Brief at 41). But as we are sure appellants are aware, a substantial number of persons who have lived in the State since Statehood are young people who, as they approach majority, must reach a decision as to whether to stay in Alaska or to leave. Their only present commitment to the State is through their parents—this plan provides a personal incentive for them to remain in Alaska.

to solve its problems all at once by every available means. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). And, of course, the availability of "less restrictive alternatives" is not even relevant where there is no burden imposed on an independent Constitutional right and no suspect classification involved in challenged legislation.[25] Where rationality is the test, it is irrelevant that other, perhaps even better, means might have been chosen. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

In a similar vein, Appellants argue that the purpose of encouraging prudent management of the Permanent Fund would be equally well served by a per capita system of distribution. A per capita distribution was in fact considered and ultimately rejected in favor of this program, because the legislature had sufficient reasons to believe that a per capita system would actually undercut the desired goals. But whether the legislature was right or wrong in its judgment is not the issue here, for as this Court stated in *New Orleans v. Dukes, supra*, ". . . the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations that neither affect fundamental rights nor proceed along suspect lines . . . ." *Id.* at 303 (citation omitted).

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[25]The availability of "less restrictive alternatives" is most often at issue in cases involving a denial of privileges and immunities or discrimination against interstate commerce. No doubt this explains appellants' reliance on Dean Milk Co. v. Madison, 340 U.S. 349 (1951). There is, of course, no Commerce Clause question at issue in this case. When strict scrutiny is required under the Equal Protection Clause, a classification must be *necessary* to promote a *compelling* state interest, and the availability of alternative means may be relevant to the issues both of necessity and the compelling nature of the State interest. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 637 (1969).

Appellants have not challenged the validity of encouraging prudent management of the Permanent Fund and of the State's natural resources. Instead, they argue that this purpose simply reflects a "concern over protection of the public fisc," a concern they claim is insufficient to justify the dividend program. Their reliance on *Rivera v. Dunn*, 329 F.Supp. 554 (D. Conn. 1971), *aff'd mem.*, 404 U.S. 1054 (1972) and *Maricopa County*, however, is misplaced. In both of these cases, one year residency requirements for welfare and medical benefits for the poor were found to impose a penalty on the fundamental right of interstate migration, and thus the requirements could be upheld only upon a showing of a *compelling* state interest. The dividend program imposes no penalty on that or any other right, and the State's purposes need not be "compelling." More important, the interests of Alaska in the long-term management of its Permanent Fund and of its natural resources are of considerably greater magnitude than a simple desire to save money on a program such as welfare or medical care for the poor. These interests are certainly of sufficient weight to sustain the rationality of the program. *See, Baldwin, supra,* 338-91.

Appellants further contend that Alaska's efforts to encourage prudent management of the Permanent Fund and its mineral resources cannot provide justification for "an otherwise impermissible classification." Appellants' Br. at 42. The major difficulty with appellants' argument is that they fail to identify the group that is "impermissibly" classified. In this case there is no basis for concluding that any one class of residents is being motivated by advantageous treatment to support a program at the expense of any other class of residents. The vast majority of residents applying for dividends for 1979 fell into what appellants have characterized as the "disadvantaged class"—those who were entitled to less than the maximum possible number of

dividends. This so-called disadvantaged class contains more than sufficient numbers to protect its interests in the political arena.[26] Thus, this case does not involve "otherwise invidious discrimination," directed at those who have insufficient political power to protect themselves from majority interests.

Further, the arguments concerning "political support" that were rejected in *Maricopa County, Baldwin,* and *Cole v. Housing Authority of Newport*[27] were based entirely on an attribution to voters of purposes and motives that a state could not itself directly pursue. In *Maricopa County* and in *Cole,* for example, durational residency requirements were argued to be necessary because voters would not support public medical care or public housing programs unless the programs were structured in such a way that indigents would be discouraged from migrating into their communities. A state could not directly pursue such a purpose. *Edwards v. California,* 314 U.S. 160 (1941). Similarly, the argument was made in *Shapiro* that Congress had authorized states to impose waiting periods for welfare benefits. The Court answered this argument in part by posing and then rejecting the following hypothetical:

> Perhaps Congress could ensure wider participation in school construction if it authorized the use of joint funds for the building of segregated schools. . . . Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the states to violate the Equal Protection Clause.

Id. at 641. Since neither Congress nor the states may pursue a policy of racially segregated schools, Congress may not do so indirectly by assuming that states will build

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[26] *See,* Appendix A.

[27] 435 F.2d 807 (1st Cir. 1970).

more schools if the voters in those states knew the schools would be segregated. But Alaska here is not attempting to motivate its citizens to do anything that the State could not itself do directly—encourage a positive interest by all residents in the prudent management of the Permanent Fund and the State's mineral resources.

Faced with an obviously rational basis for the dividend plan, appellants alternatively suggest that this Court not apply the rational basis test at all—— that it should instead subject the dividend program to an "intermediate" level of scrutiny—one more stringent than the rational basis test. The concept of a level of judicial scrutiny in equal protection cases that "bridges the gap" between the rational basis test and the compelling state interest test is not new.[28] There is, however, no apparent unanimity about what should be involved in an intermediate level of scrutiny and under what circumstances it should be applied.[29]

In some cases intermediate review or "intensified" scrutiny has meant that a classification must have more

[28]Interestingly enough, intensified scrutiny is *required* for equal protection purposes in all cases under the Alaska Constitution. Under the Alaska Constitution, a classification must not only bear a fair and substantial relationship to legitimate state purposes, but when substantial, but less than fundamental, individual interests are affected, the state's interests must outweigh the individual interests. A more stringent "fair and substantial relationship" test for Alaska was announced in Isakson v. Rickey, 550 P.2d 359 (Alaska 1976). Two years later the Alaska Supreme Court also adopted the balancing approach. State v. Erickson, 574 P.2d 1 (Alaska 1978). Both elements of intensified scrutiny were applied by the Alaska Court to the dividend program.

[29]*Compare*, G. Gunther, The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine On A Changing Court: A Model for a New Equal Protection, 86 Harv.L.Rev. 1 (1972); *with* L. Tribe, American Constitutional Law § 16-31 at 1089-92 (1978); and *see*, United States Railroad Retirement Board v. Fritz, 49 U.S.L.W. 4035, 4038 n.10 (U.S. Dec. 9, 1980).

than a rational relationship to *some* governmental purpose —the governmental purpose must itself be of some importance, and it must outweigh the importance of the individuals' interests that are affected. Thus, in *Sosna*, "purely budgetary considerations or administrative convenience" would apparently not have been sufficiently weighty to justify denying a new resident access to the divorce courts for a one-year period. *Id.* at 405. Iowa's interests in the adjudication of marital disputes in its state courts, however, were presumably of greater magnitude, and were sufficient. In other cases intensified scrutiny has meant that the Court will be less tolerant of classifications that are either over-inclusive or under-inclusive. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976).

A fundamental ingredient of intermediate scrutiny analysis is the identification and evaluation of the individual interests involved. It is not entirely clear, however, what individual interests are being asserted by appellants, apart from their arguments concerning the right to travel and the existence of a suspect classification. As we have discussed above, this program does not penalize the right to travel in any way, and it does not infringe on any other federally recognized right of state or national citizenship. Appellants also make an oblique reference to the "right that each citizen has to publicly owned natural resources in the property law sense." Appellants' Br. at 27. But even if citizens have a right "in the property law sense" to the State's lands and mineral resources, they clearly do not "own" the money in the State treasury in that sense. If they did, a state could never establish programs that did not provide exactly equal benefits, or build roads or public facilities that were not equally used by all residents. It could only take in revenues and annually distribute them on a per capita basis to its citizens.

The State is not distributing its lands or its mineral resources under this program. It is distributing a portion of the earnings from the Permanent Fund—earnings that would be deposited in the general fund of the State and available for general appropriation if they were not distributed as dividends. Appellants simply do not have a right to receive equal amounts with all other residents under every State program that distributes monetary benefits. A state may distribute unequal amounts to its citizens so long as the distinctions are rationally based. Appellants' asserted interest in "equality" is adequately protected by the requirements of the rational basis test, and this interest does not warrant special balancing.[30] In fact, the only individual interest actually affected here is how much money will be received under a program that provides a supplement to personal income that is totally unrelated to need.[31]

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[30]This case, in terms of the individual interests at stake, much more closely resembles the cases in which this Court has *not* balanced individual interests against governmental interests and has *not* required distinctions to be drawn with great precision. For example, in Baldwin v. Montana Fish & Game Commission, 436 U.S. 371 (1978) the Court applied the rational basis test when reviewing the equal protection challenge to Montana's non-resident hunting license fees. There the interest at stake was reduced license fees for recreational hunting, even though residency formed the only basis for the distinction. *See also,* U.S. Railroad Retirement Board v. Fritz, 49 U.S.L.W. 4035 (U.S. Dec. 9, 1980) (denial of "windfall" retirement benefits); Schweiker v. Wilson, 49 U.S.L.W. 4207 (U.S. March 23, 1981) (denial of supplemental "comfort money" under Social Security Act); and Califano v. Torres, 435 U.S. 1 (1978) (denial of enhanced supplemental Social Security benefits).

[31]In past decisions of this Court, which at least one commentator has identified as employing an intensified level of scrutiny, the individual interests, by contrast were substantial. *See, e.g., Stanley v. Illinois,* 405 U.S. 645 (1972) (A father's interest in retaining

The State's interests, by contrast, are significant. We have already reviewed the circumstances leading up to the establishment of the Permanent Fund. That review illustrates the important role the Permanent Fund is expected to play in Alaska's future. Difficult choices face the people of Alaska and their elected representatives over the next few decades—choices that will affect the quality of life in Alaska for generations to come.[32] As we have shown, the dividend program is closely tied to the purposes of the Permanent Fund, and the program is designed to encourage Alaskans to make responsible choices during the critical years in which oil revenues are still available and flowing into the Permanent Fund. As the Alaska Court found, the interests of the State in this program are the result of the convergence of a number of important concerns:

> administering and husbanding Alaska's new-found wealth, avoiding the 'cost-free' expansion of government, coping with an acute population turnover problem, and containing and counterbalancing the push for immediate development of Alaska's resources. . . .

Williams v. Zobel, 619 P.2d 448, 463 (Alaska 1980). The Alaska Court correctly concluded that the State's inter-

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custody of his biological children) and *Cleveland Bd. of Educ., v. La Fleur*, 414 U.S. 632 (1974) (A woman's decision to bear a child), cited in L. Tribe, American Constitutional Law, § 16-31 at 1090, n. 1.

[32]No doubt some states might view Alaska's situation as purely good fortune and would gladly exchange their problems for Alaska's. But this view is a superficial one. When one considers the limited duration of Alaska's oil wealth, it becomes clear that Alaska's problems are much more serious and complex than simply finding ways to spend money.

ests outweigh appellants' individual interests,[23] and that the method of dividend distribution under this program "substantially furthers" legitimate State goals.

Finally, appellants have argued that this program would "truly revolutionize the relationship between a state and its citizenry." Appellant's Br. at 11. They predict that a "State could as easily issue fishing licenses which entitle the bearer to take one fish for every year that he had lived in the State, ration the use of public lands based on durational residency or reserve the finest schools for the children of long-term residents." *Id.* at 12. Appellants argue in effect that upholding the constitutionality of the dividend program will automatically validate any other state program that employs a similar method of accumulated benefits. Their fears are greatly exaggerated and their concerns unwarranted. If the Court upholds Alaska's Permanent Fund dividend program it will mean only that this unique plan is rationally related to legitimate state goals. Whether a state may employ similar methods of accumulated benefits for other programs would depend on whether the state could show that legitimate governmental interests were furthered by that type of accumulated distribution

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[23]Appellants have also argued that there are "federalism" interests that must go into the balance, and that the Alaska Court failed to take these interests adequately into account. The only "federalism" interest that appellants advanced before the Alaska Court was the right of interstate migration. The Alaska Court carefully reviewed the impact that this program has on the right to travel and concluded that there was no impact of any substance, and non conceivable penalty. Appellants now assert for the first time a "federalism" interest in equality of state citizenship. But as we have previously noted, this interest is protected in part by reference to privileges and immunities requirements, which have no application here, and in part by reference to the Equal Protection clause, which requires in the circumstances of this case, only that there be a rational basis for the distribution program.

method. If substantial individual interests were affected in such a program (which they are not here), the constitutionality of the program would further depend on the importance of the state interests sought to be promoted.

A state program challenged on equal protection grounds must be judged on its own merits to determine the rationality of the choices made by the state. While it might be possible, for instance, to postulate some conceivable set of circumstances that would form a rational basis for a program providing for annually increasing "bag limits" for recreational fishing based on length of residency,[34] it is difficult to imagine any circumstances that would rationally lead a legislature to ration public lands use on an accumulated basis or to shift Alaska's children from year to year to increasingly better schools. Upholding the constitutionality of this dividend program will not pave the way for judicial approval of a host of irrational state programs, in part because of the unique circumstances that led to the establishment of this program, but primarily because any other

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[34]Without suggesting the outcome of such a controversy, we note that the Court has recognized vast differences between sport and commercial use of fish and game in the past. For instance, while a state may charge disproportionate license fees between nonresidents and residents for recreational hunting; Baldwin v. Montana Fish & Game Comm'n., *supra*; it may not do so for commercial fishing. Toomer v. Witsell, 334 U.S. 385 (1948). Moreover, if a state may charge a new resident a higher license fee to take a uniform bag limit of sport fish, would it really be a federal constitutional issue if, the same state did away with license fee differentials but allowed residents to gradually increase their bag limit as they lived in the State? We doubt any legislature would take this course, but we equally doubt that the issue of whether a resident might take 3 or 5 trout in any one day is a matter affecting "national unity"—one which would approach constitutional dimensions.

state program that purported to be similar must itself rest on independent rational grounds.

The relationship between a state and its citizens is, of course, generally not a matter of federal law at all. It is a relationship defined by the constitution of each state and the political processes which take place in each state. The application of federal law to a definition of the "relationship" is limited. The federal Constitution rigorously protects those "fundamental" rights that are necessary to achieve national union—the privileges and immunities of citizenship, the rights of migration, the right to engage in free commerce to name a few, but beyond these fundamental rights, federal law only requires that states treat their citizens in a non-arbitrary fashion. Laws which distinguish between citizens of a state are valid so long as they rest "on some ground of difference having a fair and substantial relationship to the object of the legislation." *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920).

In this case, the residents of Alaska acting through their legislators have chosen to distribute dividends in a way that they believe will best further the interests of the State. No national interest is involved—no significant individual interest is affected. The citizens of the State may or may not be right in their judgment, but they have the right under our federal system to make the judgment. Appellants are citizens of the State and they are subject to the collective will of the majority of people of the State. That is the basic "relationship" between a citizen and a state, and it is not threatened here.

CONCLUSION

Many years ago, Justice Brandeis commented that:

> " . . . one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The dividend distribution plan is just such an experiment. Its purposes have nothing to do with favoring the interests of old time Alaskans over the interests of new residents of the State. In contrast, this plan is one under which all Alaskans may benefit, now and long into the future. All share the same rights and all, in the end, benefit equally. The particular method of distributing permanent fund income selected by the Alaska legislature may not entirely solve the problems that we have discussed here. But the method of distribution is "fairly and substantially" linked to a solution of those problems. That is all that the Constitution requires. The decision of the Alaska Supreme Court in this case should be affirmed.

Respectfully submitted,

WILSON L. CONDON
Attorney General
SUSAN A. BURKE
COUNSEL OF RECORD
Assistant Attorney General
AVRUM M. GROSS
Special Counsel to the Attorney General
Counsel for Appellees

(Appendix follows)

Appendix A

Memorandum

State of Alaska

Date: April 23, 1981

To: Wilson L. Condon
Attorney General

From: Thomas K. Williams
Commissioner
Department of Revenue

Subject: Permanent Fund Dividend Statistics

Dear General Condon:

Attached, as you requested, are the preliminary computer printouts showing the number of persons who applied for permanent fund dividends in 1980, and a breakdown of the length of residency of the various applicants. There were a total number of 235,717 persons who applied for the dividends out of a state population of approximately 400,000. The discrepancy of course is due in large part to the fact that dividends are only payable to persons 18 years or older.

Department of Revenue, Research Section
Permanent Fund Share Description

Table 08
Applicants and Shares
By Resident Years Since Statehood

Resident Group	Number of Applicants	Group Shares	% Apps* of Total	% Shrs* of Total	Avg Shrs Per App
0 Part Year 1979**	6,739	3,446	2.9	0.1	0.51
1 Years Since 1959	9,885	9,894	4.2	0.4	1.00
2 Years Since 1959	11,884	23,558	5.0	0.8	1.98
3 Years Since 1959	12,933	38,400	5.5	1.4	2.97
4 Years Since 1959	14,584	57,821	6.2	2.0	3.96
5 Years Since 1959	12,200	60,520	5.2	2.1	4.96
6 Years Since 1959	8,726	51,803	3.7	1.8	5.94
7 Years Since 1959	7,900	54,749	3.4	1.9	6.93
8 Years Since 1959	7,379	58,316	3.1	2.1	7.90
9 Years Since 1959	8,383	74,792	3.6	2.6	8.92
10 Years Since 1959	8,325	82,476	3.5	2.9	9.91
11 Years Since 1959	6,880	75,019	2.9	2.6	10.90
12 Years Since 1959	6,498	77,277	2.8	2.7	11.89
13 Years Since 1959	5,217	67,166	2.2	2.4	12.87
14 Years Since 1959	5,525	76,546	2.3	2.7	13.85
15 Years Since 1959	5,135	76,138	2.2	2.7	14.83
16 Years Since 1959	4,570	72,146	1.9	2.5	15.79
17 Years Since 1959	4,430	74,122	1.9	2.6	16.73
18 Years Since 1959	7,434	132,958	3.2	4.7	17.77
19 Years Since 1959	7,479	140,360	3.2	4.9	18.77
20 Years Since 1959	7,716	151,380	3.3	5.3	19.62
21 Years Since 1959	65,845	1,382,745	27.9	48.7	21.00
Total Applicants	235,717	2,841,633	100.0%	100.0%	12.06

*Group percentages and shares may not add to 100% or total due to rounding.

**This includes those applicants who lived in Alaska part of 1979 only. If an applicant lived part of 1979 in Alaska and claimed prior full years, s/he is classed with those with the same number of full years of Alaskan residency.

Appendix B

Memorandum
State of Alaska

Date: April 21, 1981

To: Ronald D. Lehr, Director
Division of Budget & Management
Office of the Governor

From: Bob Rehfeld, Budget Analyst
Division of Budget & Management
Office of the Governor

You have asked for information pertaining to the level of Social Services activities as a result of creation of the Alaska Permanent Fund Dividend Program (PFD). My analysis is limited to Assistance Payments, certain subsidy programs and the Alaska Pioneers Programs. As will be observed, it does not appear any correlation exists between passage of the PFD legislation and reductions in Social Services Programs.

Pioneers Homes

1. A new Pioneers Home in Ketchikan is scheduled for completion in December, 1981. Operating costs are included in the Governor's FY 82 budget.

2. The Nursing Wing at the Anchorage Pioneers Home is scheduled for completion in April, 1982. Operating costs are also budgeted for in the Governor's FY 82 budget.

3. Monthly rates for Pioneers Home residents are $225.00 for ambulatory residents and $275.00 for skilled nursing residents. The total of receipts collected in FY 80 was 1.3 million. Being a heavily subsidized program, this amount is equal to only 12% of the total operating costs of the Pioneers Homes.

Longevity Bonus

1. Longevity Bonuses were increased $25 to $200 by the Legislature in 1980.

2. Pending Legislation this year would:
   a. increase the Bonus amount to $250
   b. provide longevity bonus and Pioneer Home benefits to all residents of Alaska 65 years and older.

Assistance Payments

1. Aid to Families with Dependent Children (AFDC)—Passage of SCSCSHB 986 (AS 47.25.300) in 1980 provided both a $50.00 payment increase for recipients and a provision which ties annual cost of living increases to rates used in calculating yearly Social Security Benefit increases. These two changes resulted in an average $57.00 increase to all AFDC recipients on January 1, 1981.

2. Proposed Legislation affecting AFDC would provide an average $25.00 monthly increase for dependent children living with a non-needy relative.

3. Aid to Blind, Disabled, and Old Age Assistance Payments—Statutory changes in 1980 tie yearly benefit increases to the cost of living increases used in determining Federal Social Security benefit levels.

4. Proposed Legislation would increase the General Relief maximum allowable monthly payment from $80.00 to $160.00 and effectively doubling this program's yearly allocation.

Senior Citizen Property Tax Exemptions

1. Chapter 124, SLA 1980, doubled the Tax Equivalency Payments to Senior Citizens whose monthly rent is subject to municipal property tax.

Child Assistance Programs

1. Day Care—An $800,000 increment increase is included in the Governor's FY 82 budget to increase the maximum day care subsidy from $12.00 to $16.00 a day.

Senior Citizen Housing

1. In recent Legislative action, the House approved a 15 million dollar special appropriation to provide planning and construction funds for Senior Citizen housing projects.

Memorandum
State of Alaska
Date: April 22, 1981
To: Ronald D. Lehr, Director
Division of Budget & Management
Office of the Governor
From: Rebecca Burch, Budget Analyst
Division of Budget & Management
Office of the Governor
Subject: Medicaid and GR Medical
FY 80 - FY 82 Outlays and Language Changes

Medicaid

FY 80 Actual	Fed	Gen. Fund	Other
30,997.8	16,649.9	4,969.1	9,378.8
FY 81 Authorization			
45,698.1	26,568.3	16,779.8	2,350.0
FY 82 Governors Operating Budget			
48,388.8	25,940.7	22.448.1	-0-

General Relief Medical

FY 80 Actual	Fed	Gen. Fund	Other
9,513.3		9,513.3	
FY 81 Authorization			
12,168.3		12,168.3	
FY 82 Governors Operating Budget			
14,133.5		14,133.5	

Notes:

1. Language in the FY 81 Authorization Bill Chapter 120 indicating that "If the Federal Revenue Sharing Funds Appropriated for Medicaid fall short of the estimate the Amount of the shortfall is appropriated from the General Fund."

2. Progressively more funding is budgeted for Medicaid and GRM each year from 80-82.

3. Additional Capital Funding has been added to improve payment processing and more eligibility workers have been requested for the Public Assistance program to provide a more timely public service.